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Nos. 71-1016 and 71-1040

In the Supreme Court of the United States

OCTOBER TERM, 1971

FEDERAL POWER COMMISSION,
Petitioner

v.

LOUISIANA POWER & LIGHT CO., ET AL.

UNITED GAS PIPE LINE CO. and PENNZOIL UNITED, INC.,
Petitioners

v.

LOUISIANA POWER & LIGHT CO., ET AL.

On Writ of Certiorari to The United States Court of Appeals for the Fifth Circuit

REPLY BRIEF FOR UNITED AND PENNZOIL

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REPLY BRIEF FOR UNITED AND PENNZOIL

ARGUMENT

I. Introduction

The critical shortage of natural gas cannot be seriously contested. The shortage has been judicially acknowledged by both the court of appeals, *Austral Oil Co.* v. *Federal Power Comm'n*, 428 F.2d 407 (5th Cir.), *cert. denied*, 400 U.S. 950 (1970), and the district court (A. 260; R. 427-28); each day brings increasing public

awareness of its dimensions. This past week the federal government's principal energy spokesmen testified that the shortage of natural gas is severe and that anticipated demand for gas cannot be met from domestic sources in the foreseeable future.[1]

A. The Underlying Issue Is Who Will Determine Priorities To A Finite Gas Supply.

It is undisputed that the total gas requirements of all of United's customers cannot be met. The electrical utilities, the other industrial customers, the gas distributors each assert in this Court a different theory by which they and their customers should have priority. The inconsistent nature of these positions and the problems they pose for United are apparent. If the Federal Power Commission (FPC) lacks jurisdiction to allocate scarce supplies in times of shortage, the priorities will be based on who has the physical capacity, by virtue of geographical location near United's gas sources, to take his gas first and on who is able first to get an injunction against United's curtailment program. The gas obtained by this means would necessarily be taken from other customers of United.

Thus, LPL's suggestion that this case is simply a private contractual dispute between it and United has a hollow ring. LPL—and those who join it in this argument—are in fact urging unregulated chaos. As a practical matter, systemwide curtailment priorities

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[1] Testimony before the House Committee on Interior and Insular Affairs, April 10 and 11, 1972, of Honorable Rogers C. B. Morton, Secretary of the Interior; Honorable John N. Irwin, II, Under Secretary of State; Honorable George A. Lincoln, Director, Office of Emergency Preparedness; Honorable Barry J. Shillito, Assistant Secretary of Defense for Installations and Logistics; and Dr. Edward E. David, Jr., Science Advisor to the President.

cannot be uniformly established by private litigation between United and individual customers and, in view of the fact that gas from United's system serves most of the eastern portion of the United States, such priorities are beyond the control of any state regulatory body.

B. LPL and Others Argue a Number of Disputed Issues Which Are Irrelevant to the Questions Before This Court.

It is regrettable that LPL and others devote substantial portions of their briefs to malicious, inaccurate and wholly irrelevant accusations of wrongdoing on the part of United. These unsupported charges of a grand conspiracy (euphemistically characterized as "a designed program") not only ignore the legal questions before this Court, but appear to be based on the assumption that this Court's decision of the legal questions could be influenced by a blatant appeal to emotion and prejudice. While United will not be led into a lengthy discussion of allegations and issues which are not before this Court, some comment as to the accuracy of these charges is in order.

LPL has the audacity to assert that United and the FPC have joined in a "conspiracy" to permit curtailments for the purpose of increasing United's revenues. Essential to this purported scheme is the assertion that United merely created the illusion of a natural gas shortage.[2] The short answer is that the need to curtail

[2] This is indeed a grand illusion since it requires for its effectiveness the active participation of all gas producers, the pipelines, the distributors and their customers, the news media, and every element of the federal government with energy policy responsibilities. All of the foregoing have verified the existence and critical nature of the natural gas shortage.

deliveries has been a financial catastrophe for United and will continue to be until service has been fully restored.[3] Indeed, the suggestion of a United-FPC conspiracy is ludicrous on its face at a time when six other gas pipelines are also curtailing service and when 26 pipelines have filed curtailment programs—all pursuant to the same FPC order and procedures.

The issue presented to this Court is *not* the origin of United's gas shortage or, as Monsanto and Texas Gulf have argued, whether United's systemwide shortage was "self induced' by improvident additions of service. First, the service in question was certificated by the FPC. Moreover, this charge was directly rebutted by United in the FPC curtailment proceeding and this issue was specifically remanded to the FPC examiner for consideration in making the determination as to the reasonableness and proper implementation of the United curtailment plans.[4] The effort to reargue before this Court a disputed portion of the curtailment proceeding is wholly irrelevant to the question of FPC curtailment jurisdiction.

The issue is also *not* whether United has legal obligations to any of its various customers as a result of curtailments. LPL's action in the district court was a suit to enjoin United's curtailments, not a suit for damages. Thus, the only question presented to this Court with respect to curtailments is the FPC's juris-

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[3] United's 1970 and 1971 FPC Form 11 reports show that total gas sales in 1971 declined from 1970 by 7.17 percent. The same reports show United's net income falling from $19,685,835 in 1970 to $7,669,510 in 1971. The decline in sales and profits is accelerating in 1972.

[4] *United Gas Pipe Line Co.*, FPC Opinion No. 606-A, (Mimeo at 4, December 3, 1971).

diction to allocate limited supplies of gas among all of United's customers.

LPL also seeks to mislead this Court as to the impact of United's curtailments on LPL's human needs consumers. It falsely argues (LPL Br. 35) that the gas it is not receiving under the curtailment program is needed to cool homes and for other domestic purposes. In fact, it is undisputed that United's curtailment of gas deliveries to LPL and other electric utilities affects **only** deliveries for the generation of electricity for industrial use and in no way reduces gas available to generate electricity for domestic use.

LPL's argument that United deliberately introduced small amounts of interstate gas into a previously local system for the purpose of escaping improvident industrial contracts is contrary to the facts. The record in the certificate case, FPC Docket No. CP71-89, makes clear that on the 1971-72 peak day over 58 percent of the gas flowing in United's Green System was interstate gas. (Echteroff Test. 10-11; A. 154, 159; R. 252, 264); this gas has been used because United has been unable to supply that system solely with local gas.[6]

Moreover, testimony filed by United on March 27, 1972 in the certificate case reveals that the great bulk of the facilities in the Green System were certificated by the FPC many years ago, and that these certificates

[6] LPL attempts to escape the undisputed evidence that local reserves are simply not adequate to meet the peak-day demands in the Green System by arguing (LPL Br. 42) that the Pennzoil Producing Company gas production from the Lirette and Bay Baptiste fields was sufficient, at least during 1970, to meet the net annual deficiency in the Green System. This overlooks the fact that gas is not delivered on a net annual flow basis; it is delivered on a daily basis. The certificate record makes clear that the peak-day deficiency in the Green System cannot be met by daily deliveries from Pennzoil Producing reserves.

have never been terminated or abandoned. Since 1954, as a result of FPC approval of a settlement agreement and stipulation in one of United's rate cases, sales for resale from these facilities have been treated as not being subject to FPC rate jurisdiction. Thus, during th past thirty years the jurisdictional status of this portion of United's system has varied, depending upon changes in supply and demand patterns.[7]

All of these sweeping and unsupported charges concerning the curtailment and certificate cases have a single goal: to obscure the fundamental jurisdictional questions to be decided by this Court.

II. LPL And Its Supporters Misread The Natural Gas Act, Its Legislative History, And This Court's Decisions With Respect To The FPC's Curtailment Authority.

No one disputes that the FPC cannot regulate direct sale *rates*. Thus, LPL's argument based on the language of the Natural Gas Act (the Act), the legislative history to that effect and the cases which support that construction of the Act is a straw-man. For the fact that the FPC cannot regulate direct sale *rates* in no way diminishes the ability of the FPC to deal with curtailments under the transportation authority granted in Section 1(b) by regulating the volumes of interstate gas transported to all customers of a jurisdictional pipeline.

Nor is LPL helped by the quotation from *Federal Power Commission* v. *Transcontinental Gas Pipe Line*

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[7] The Fifth Circuit did not, of course, have this history before it when it reached its decision. This illustrates the danger of a premature judicial decision resulting from a collateral attack on a pending agency proceeding and made on the basis of an incomplete record.

Corp., 365 U.S. 1 (1961) (*Transco*). The fact that the FPC has the power to completely veto a direct sale at the certificate stage is in no way inconsistent with its subsequent exercise of transportation authority to allocate scarce supplies in time of shortage. Indeed, in *Transco*, 365 U.S. 1, 28, this Court quoted from and reaffirmed its statement in *Panhandle Eastern Pipe Line Co.* v. *Public Service Comm'n*, 332 U.S. 507 (1947) that:

> "... [T]he matter of interrupting service is one largely related ... to transportation and thus within the jurisdiction of the Federal Power Commission to control, in accomodation of any conflicting interests among various states." 332 U.S. 507, 523.

This Court's reaffirmation in *Transco* of its 1947 *Panhandle* description of the FPC's curtailment authority effectively disposes of LPL's contention that this statement was dictum. For in *Transco*, 365 U.S. 1, 27, this Court noted that its articulation of FPC authority to control the interruption of service was made in direct response to Panhandle's argument that the states could not control direct sales rates because of the possibility that they could not deal effectively with curtailments.

It is argued by some that, although the FPC has curtailment jurisdiction, such authority can be exercised only after the completion of a Section 7(b) abandonment proceeding. This argument ignores the fact that shortages create emergencies requiring immediate allocation of limited supplies among all customers in a manner consistent with the public interest. To say that no curtailments of firm service can take place until the completion of lengthy hearings and the issuance of an FPC abandonment order is to ignore the reality that

when there is insufficient gas to meet the demands of all customers some customers *will* be curtailed during the pendency of the proceedings.

Thus, to adopt the argument that the FPC is impotent to allocate limited supplies during the pendency of a hearing as to proper priorities of service would entirely defeat the effective exercise of its curtailment jurisdiction. The interests of a pipeline's other customers would be subordinated to those of its direct industrial customers since the industrials, by virtue of their superior location on the pipeline system, could take whatever gas they need, leaving only the residue available to supply human needs consumption. Moreover, a pipeline's industrial customers would be free to impose a curtailment plan favorable to them by collateral suits at the very time, under this theory, that the FPC's hands are tied by the pendency of the curtailment proceeding.

This does not mean, however, that the implementation of curtailment plans by the filing of tariff sheets under Sections 4 and 5 deprives customers of their procedural safeguards or gives pipelines the freedom to unilaterally impose a curtailment program of their choice. On the contrary, the FPC has already modified United's curtailment plan in several respects. Comprehensive hearings have been held on the fairness of the curtailment priorities. The FPC will ultimately issue an order on the reasonableness and proper implementation of the plan — a finding that will govern future curtailment priorities and will affect United's responsibilities to its customers for past curtailments. In all respects, this is a more realistic and equitable procedure for the exercise of curtailment jurisdiction than the alternative suggested — an establishment of prior-

ities by industrial customers on a self-help or injunction basis.

Those who contest this exercise of FPC jurisdiction fail to point out that if the FPC is not permitted to enforce interim implementation of curtailment plans there will be no regulation at all. Thus, it misses the point to argue that FPC reliance on the inability of individual courts or state agencies to effectively regulate curtailments is an argument that "need" alone can provide statutory authority. Rather, the inability to regulate by other means demonstrates, consistent with *Transco, supra,* that Congress must have intended federal regulation of this problem so as to avoid a regulatory gap.

In short, Section 1(b) of the Act contains a separate, independent grant of transportation authority which the FPC has properly exercised in curtailment situations by utilization of Sections 4 and 5 of the Act.

III. LPL And The Producers Have Not Justified Failure To Exhaust Administrative Remedies In The Certificate Proceeding.

The exhaustion arguments raised by LPL and others are quickly dispatched. LPL and Texaco both argue that the FPC is free to continue to conduct the certificate proceeding and that they have in no way sought to interfere with the conduct of that proceeding. Specifically, Texaco points out that no injunction against the FPC has been sought and that, consequently, United's exhaustion authorities[8] are inapplicable. This is

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[8] *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41 (1938); *Marine Engineers Beneficial Association* v. *Interlake Steamship Co.*, 370 U.S. 173 (1962) and *Federal Power Commission* v. *Arkansas Power & Light Co.*, 330 U.S. 802, *rev'g. mem.* 156 F.2d 821 (D.C. Cir. 1946).

simply not true. The court of appeals decision, if upheld, would remove the Green System from FPC jurisdiction just as effectively as if LPL had obtained an injunction prohibiting the FPC from exercising regulatory authority over the Green System.

Nor can United's exhaustion authorities be distinguished by LPL and others on that ground that, in their view, no arguable basis for FPC jurisdiction exists in this case but that agency jurisdiction was relatively clear in the exhaustion cases. The FPC is attempting to conduct a Section 7 certificate proceeding with respect to United's facilities in its Victoria and New Orleans Divisions. If anything is undisputed on this record it is that the FPC has authority, upon application of a jurisdictional pipeline, to conduct such a proceeding.

LPL's argument (LPL Br. 44-45) that it is not required to exhaust because the FPC cannot grant injunctive relief is patently without merit. A party may not escape application of the exhaustion doctrine simply because the full range of remedies which might be available in a judicial proceeding are not available at the agency. Moreover, LPL has a remedy at the FPC. If it thinks that it is entitled to more gas than it is presently getting under United's curtailment program, it may request the Commission to order United to give it more gas. The FPC has repeatedly expressed a willingness to entertain such applications[9] and in fact has granted in part such an application by

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[9] *United Gas Pipe Line Co.*, FPC Opinion No. 606 (Mimeo at 14, Oct. 5, 1971); *United Gas Pipe Line Co.*, FPC Docket Nos. RP71-29, RP71-120 (Order of July 2, 1971); *Northern Natural Gas Co.*, FPC Docket No. RP71-89 (Order of March 19, 1971).

Texas Gulf, one of the *amicus* participants in this case.[10]

The argument based on *Federal Power Commission* v. *Panhandle Eastern Pipe Line Co.*, 337 U.S. 498 (1949) and *Grubb* v. *Public Utilities Comm'n*, 281 U.S. 470 (1930), amounts to a contention that United and the FPC are bound in this Court under principles of *res judicata* by the judgment of the court of appeals now under review. This position is patently absurd.

The additional cases relied on by LPL (LPL Br. 43-46) provide no insulation from the exhaustion doctrine. *Township of Hillsborough* v. *Cromwell*, 326 U.S. 620 (1946), and *McNeese* v. *Board of Education*, 373 U.S. 668 (1963), both involve situations in which a judicial remedy for protection of federal due process or equal protection rights was provided by statute as supplementary to or independent of an administrative remedy. *Skinner & Eddy Corp.* v. *United States*, 249 U.S. 557 (1919), and *Leedom* v. *Kyne*, 358 U.S. 184 (1958), both involve *reviewability* problems that arose after an agency order had been issued. None of these cases authorize a collateral attack during the pendency of agency proceedings.

LPL's argument based on *City Bank Farmers Trust Co.* v. *Schnader*, 291 U.S. 24 (1934), that exhaustion is not required when there is relative certainty of an adverse agency decision is unimpressive. Reduced to its simplest terms, the argument would authorize a resort to the courts every time a party to an agency proceeding concluded that his position was unmeritorious. In view of this Court's requirement of exhaus-

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[10] *United Gas Pipe Line Co.*, FPC Docket Nos. RP71-29, RP71-120 (Order of January 28, 1972).

tion in *Gilchrist* v. *Interborough Rapid Transit Co.*, 279 U.S. 159 (1929), when it was relatively clear that the party being required to exhaust would not prevail before the agency and in light of the subsequent decision of this Court, *e.g., Myers, supra,* requiring exhaustion under similar circumstances, the holding in *Schnader* is of doubtful validity, 3 Davis, *Administrative Law* § 20.07, at 99-100 (1958).

The attempts of Texaco (Texaco Br. 20) and Humble (Humble Br. 42-43) to distinguish the authorities requiring review of agency jurisdictional determinations by the Section 19(b) review procedures (United Br. 22-24) do not stand analysis. Humble concedes (Humble Br. 43, n. 28) that the authorities cited by United in its opening brief hold that Section 19(b) review procedures provide the exclusive method for review of FPC orders and that a party to the certificate proceeding could not review FPC Opinion 610 in a collateral suit. However, they argue that these authorities are inapplicable when the collateral suit is filed prior to the entry of an order by the FPC. The adoption of this argument would be wholly inconsistent with the concern expressed by this Court in *McKart* v. *United States,* 395 U.S. 185, 195 (1969), that frequent and deliberate flouting of administrative processes not be permitted to weaken the effectiveness of an agency by encouraging people to ignore its procedures. Clearly, nothing could more encourage the ignoring of FPC proceedings than the adoption of a principle that the earlier one gets to the courthouse the less chance he faces of being required to exhaust his administrative remedies.

CONCLUSION

The responsive briefs wholly fail to diminish the force of the authorities presented in petitioners' briefs supporting FPC curtailment jurisdiction under the Natural Gas Act and requiring reversal of the court of appeals decision on the certificate issue for failure to exhaust administrative remedies. Accordingly, the judgment of the court of appeals should be reversed, and that of the district court affirmed.

Respectfully submitted,

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